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## SUPREME COURT OF ARIZONA

PETITION TO AMEND THE	) Supreme Court No. R-18-0044
ARIZONA RULES OF PROBATE	)
PROCEDURE	)
	)
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Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Task Force on the Arizona Rules of Probate Procedure (“Task Force”) petitions this Court to abrogate the current Arizona Rules of Probate Procedure and adopt proposed new rules. The proposed rules restyle the existing rules and make substantive changes that help ensure “a consistent, predictable, prompt, efficient, and just resolution of probate cases.” (Proposed Rule 1.)

Because the proposed amendments concern all current probate rules, this petition presents the revisions as a complete new set of rules, rather than as individual rule amendments. Appendix A to this petition contains a clean version of the proposed rules. A “redline” version is not included because the changes are so extensive that a redline would be more confusing than helpful. Appendix B is a

correlation table that the Task Force intends to incorporate within the final version of the probate rules. Appendix C contains new forms referenced in these rules.

**Section 1. Background.** Two Supreme Court committees preceded this Task Force's efforts. In 2006, the Court established a Probate Rules Committee (Admin. Order No. 2005-87), which proposed a set of probate rules that the Court adopted effective on January 1, 2009. One year later, the Court established the Committee on Improving Judicial Oversight and Processing of Probate Court Matters (Admin. Order No. 2010-52), which focused on fiduciary responsibilities and the protection of vulnerable persons. That Committee's recommendations resulted in modifications to certain Probate Rules and the adoption of Arizona Code of Judicial Administration §§ 3-302 and 3-303, which respectively concern probate forms and fee guidelines.

The Court established the current Task Force by Administrative Order No. 2017-133. Task Force members include Superior Court judges from Maricopa, Pima, Pinal, Yavapai, and Yuma Counties; several attorneys in private practice, including certified specialists in estate and trust law; a public fiduciary and a licensed private fiduciary; a representative of the Superior Court Clerks; and a retired Arizona Court of Appeals judge. The Chair is a retired Supreme Court Justice. A.O. No. 2017-133 directed the Task Force to review the current Probate Rules and "identify possible changes," and to clarify and simplify language.

**Section 2. Restyling.** The proposed probate rules, like other recently adopted rule sets, include stylistic revisions that make the rules more understandable and user-friendly. The proposed rules employ consistent formatting and nomenclature, and generally follow the conventions utilized in those previous restyling projects.

**Section 3: Probate is Different.** The probate rules differ from other court rules in important respects.

First, the probate process is largely driven by statutory requirements. (Almost half of the current probate rules include at least one reference to a specific statute.) The Task Force saw no rationale for repeating in a rule a substantive requirement that is already contained in a statute, and it agreed to abrogate current provisions that merely restated statutory requirements. The Task Force also noted that a rule that simply restates statutory language might need to be amended if the statutory language changes. Nevertheless, the Task Force agreed that for clarity, certain rules should reference the applicable or governing statute.

Second, the Task Force realized that many of the rules were either not consistent with current law or did not incorporate or allow for considerations directed by state law. Accordingly, some of the proposed rule changes are substantive and go beyond simple restyling.

Third, probate cases may involve related non-probate claims. For example, civil tort actions are routinely filed in cases concerning decedents' estates,

guardianships, and conservatorships. Similarly, an adult who is the subject of a guardianship or protective proceeding may be a party to a family law case. Accordingly, the probate rules specify which procedural rules apply in the related non-probate proceeding.

Fourth, probate involves liberty as well as property interests. Protective proceedings (including conservatorships), decedents' estates, and trusts involve property interests. Guardianships involve liberty interests. Probate rules need to provide due process to protect these interests.

Fifth, probate cases often involve self-represented litigants. Self-represented litigants many not be sophisticated, and some court-appointed fiduciaries may not be licensed, so the rules need to provide appropriate and clear guidance as well as protections.

**Section 4: Task Force Methodology.** There currently are 46 probate rules. (The last is Rule 38, but some rule numbers include a number to the right of a decimal point, which accounts for the other eight rules.) Task Force members were divided into three workgroups, and the workgroups were assigned roughly equivalent portions of the rules. A judicial officer led each workgroup. Workgroups met 40 times between April and December 2018. Outside of meetings, the workgroups reviewed drafts, researched law, and edited documents. The workgroups presented proposed revisions to the full Task Force at public meetings.

The Task Force met ten times during 2018, learning early in the process that most of the proposed probate rules were complex and that many were controversial. All the rules were the subject of exhaustive discussions at multiple meetings. The Task Force recommended abrogating current provisions that are no longer pertinent, combining associated provisions currently contained in more than one rule, and bifurcating rules and provisions when their content became too dense or multi-focused.

**Section 5: Comments.** The Task Force moved substantive matters from the comments to the rules. As a result, the proposed rules include only six comments, most of which are new and brief.

**Section 6: Preamble.** The current rules include a three-paragraph preamble, which the Task Force would abrogate and replace with the prefatory comment proposed in Appendix A.

**Section 7: Reorganization.** Whereas there are currently 46 probate rules, the new set contains 55 proposed rules. Although the Task Force eliminated some former provisions, it also included some new provisions. The rules have been renumbered so that none of the proposed rule numbers have a decimal point. Significantly, the Task Force re-organized the proposed rules by subject matter and presented them in the order in which events generally occur in a probate proceeding.

This reorganization should make it easier for users to find the provisions they are seeking.

**Section 8: The Proposed Rules.** This section summarizes many of the significant and substantive items in the proposed probate rules.

**Part I: Scope of Rules, Definitions, Applicability of Other Rules (Rules 1 - 12)**

***Rule 1 (“Scope, Applicability, and Construction”)*** differs from the current rule in two respects. First, it expressly applies to “all persons in a probate proceeding, whether self-represented or represented by an attorney.” Second, it adds the words “consistent [and] predictable” before the phrase “prompt, efficient, and just resolution of probate proceedings.”

***Rule 3 (“Probate Case and Proceedings”)*** clarifies that a “probate case” may include a “probate proceeding” and a “non-probate proceeding.” The rule explains these terms, which some stakeholders find confusing. The distinctions become important in Rule 4 and subsequent rules.

***Rule 4 (“Applicability of Other Rules”)*** advises that “the Arizona Rules of Civil Procedure apply to probate proceedings unless they are inconsistent with these probate rules or A.R.S. Title 14.” The added reference to Title 14 differentiates this provision from the corresponding provision in current Rule 3(A). Rule 4 also adds that “in non-probate proceedings, the same procedure and evidence rules apply as if the matter had been litigated as a separate action.” The Task Force received

guidance from the Advisory Committee on Rules of Evidence on another Rule 4 provision that concerns the application of the Rules of Evidence in probate proceedings. New ***Rule 5 (“Contested and Uncontested Hearings”)*** explains when a hearing is deemed contested or uncontested, which is the governing factor in Rule 4 for determining whether the Rules of Evidence apply.

The requirements of ***Rule 7 (“Document Captions”)*** have been shortened by including a cross-reference to the requirements of Civil Rule 5.2(a) (“caption”) and by only specifying those items of the caption required for probate filings. ***Rule 8 (“Confidential Documents and Information”)*** omits the unnecessary statement in current Rule 7(B) that the clerk must comply with court rules and code sections. New ***Rule 9 (“Sealing and Unsealing Court Documents”)*** incorporates by reference recently adopted Civil Rule 5.4 (“sealing and unsealing court records”), but it allows a fiduciary to have access to an appointment order and letters of appointment in a sealed case without the need for a court order unsealing the file.

***Rule 10 (“Acknowledgment of a Consent, Waiver, Renunciation, or Nomination”)*** includes introductory language that the rule requires a signature before a notary public, a judicial officer, or other person who is “legally authorized to verify the identity of the signer.” Unlike the current requirement, an acknowledgment of a consent to a petition or application is now compelled only for self-represented individuals.

***Rule 12 (“Telephonic and Video Attendance and Testimony”)***, unlike its current counterpart, permits oral as well as written requests to attend or testify by telephone. Members were divided on how far in advance of a hearing a party should make such a request. They compromised by adopting a provision that requires the request to be made “in a timely manner considering the circumstances at the time the request was made.” The provision then identifies five circumstances that may be relevant in making that determination. As part of their compromise, Task Force members added another provision allowing local rules to establish variations in this process.

## **Part Two: Initiation of Probate Proceedings (Rules 13 - 18)**

***Rule 13 (“Probate Information Form and Notice of Change of Contact Information Form”)*** provides new definitions of “contact information” and “fiduciary.” Rather than listing items of information the probate information form requires, as the current rule does, the proposed rule instructs parties to file a designated Probate Information Form. Similarly, a new provision in this rule requires fiduciaries to file a Notice of Change of Contact Information Form when a fiduciary’s or ward’s contact information has changed. (Appendix C includes these new forms.)

***Rule 14 (“Applications in Probate Proceedings”)*** and ***Rule 15 (“Petitions in Probate Proceedings”)*** begin with new sections (a) that respectively describe the



meaning of “application” and “petition.” Under Rule 14, an application is submitted to the probate registrar, and the rule includes new duties for the registrar and the clerk. The proposed rule requires the clerk to file and retain the application, including an original will, which changes current practices. The proposed rule also requires the registrar to “promptly approve or deny” the application, and if it is denied, “to file a statement with the reasons for the denial and provide a copy to the applicant.” Rule 15 more clearly describes how a petition becomes contested. Rule 15 includes a new provision on filing a joinder to a petition or a statement of no position. It also includes requirements for filing a request for an accelerated hearing on a petition that are currently in Rule 13.

***Rule 16 (“Notice of Initial Hearing on Petition”)*** modifies the required warning in section (b), in part by advising readers that attendance at the initial hearing is not required unless they oppose the requested relief, and if they do oppose it, the warning instructs the readers on necessary action.

***Rule 17 (“Initial Hearing on a Petition”)*** describes who must attend, and the procedure to be followed at, the initial hearing on a petition. This rule replaces existing Rule 12, which was entitled “Non-Appearance Hearing,” a phrase that confuses litigants as well as judicial officers because parties and others occasionally come to court for “non-appearance” hearings. Rule 17 provides that the petitioner must attend the hearing unless the court specifies otherwise, and that other interested

persons are not required to attend the hearing if they do not oppose the requested relief.

*Rule 18 (“Dismissal for Failure to Obtain a Hearing Date”)* authorizes the administrative dismissal of a petition if the petitioner does not timely obtain an initial hearing date on the petition.

### **Part Three: Subsequent Events and Actions (Rules 19 - 26)**

Part Three collects rules that are dispersed throughout the current set, including current Rule 13 on oral argument, Rule 15 on proposed orders, Rule 18 on motions, Rule 28 on an evidentiary hearing, Rule 29 on alternative dispute resolution, and Rule 35 on enforcement of court orders. The Task Force included new rules titled “conference,” “settlement conference,” and “compliance and order to show cause hearings.” Many of these proposed rules have parallel provisions defining each event and describing how the event is set and noticed, who is required to attend, and whether evidence will be presented. Rules in Part Three should particularly benefit self-represented individuals and attorneys who practice infrequently in probate court.

*Rule 19 (“Motions and Oral Argument”)* has been truncated by moving to other rules a section of current Rule 18 (“motions”) that concerns the appointment of counsel and another section of current Rule 18 regarding repetitive filings.

***Rule 26 (“Proposed Orders, Decrees, and Judgments”)*** replaces current Probate Rule 15, which cross-references Civil Rule 5.1(d). When the Probate Rules were first promulgated, the Civil Rules required a party to submit extra copies of a proposed order and pre-addressed, stamped envelopes. Following statewide adoption of electronic filing, the Civil Rules eliminated that requirement. Because electronic filing is not available in probate cases, Probate Rule 26 reinstates the requirement, although this section allows a court to “order otherwise.”

#### **Part Four: Contested Proceedings (Rules 27 - 29)**

***Rule 27 (“Management of Contested Probate Proceedings”)*** recognizes that Civil Rules on case management have changed significantly since the 2009 adoption of the probate rules, and some Civil Rule provisions are now incompatible with probate case management. For example, in a simple probate case, the judicial officer might enter a scheduling order at the initial hearing, eliminating the need for a joint report in that case, while a more complex case might require counsel to prepare a joint report and proposed scheduling order. Proposed Rule 27 accommodates different case management practices, based on the circumstances of the case.

***Rule 28 (“Disclosure and Discovery”)*** deviates from current Rule 28(B), which simply incorporates Civil Rules 26 through 37 by reference. Members agreed that the tiered discovery limits in the Civil Rules are not practical in probate cases. Thus, Rule 28 includes presumptive limits on discovery by specifying a single set of

limits applicable to all probate cases, but it allows the court to modify those limits. Rule 28 also contains a new provision permitting, under specified circumstances, a public, licensed private, or unlicensed fiduciary to obtain subpoenas for production or inspection even when no contested probate proceeding is pending.

***Rule 29 (“Demand for Jury Trial”)*** was prompted by amendments to Civil Rule 38, effective on January 1, 2019, which replaced a jury trial on demand with an automatic jury trial on issues “of right,” unless waived. The predicament is that in probate proceedings involving alleged incapacitated individuals, the subject person may lack the capacity to knowingly waive a trial (or capacity is the matter at issue). Probate Rule 29 retains juries by demand. The Court adopted on an emergency basis rule petition No. R-18-0039 to forestall application of the new Civil Rule in guardianship and conservatorship proceedings. The Task Force believes that the probate rules should not include a process for obtaining a jury in guardianships and conservatorships that differs from the process in other probate proceedings. Rule 29 is therefore broader than the emergency version because it would require a timely demand for a jury in any probate proceeding in which the right to a jury exists.

#### **Part Five: General Roles and Duties of Participants (Rules 30 - 35)**

Current Rule 10 (“duties owed by counsel, fiduciaries, unrepresented parties, and investigators”) is lengthy and dense. The Task Force separated those provisions into separate rules, located at relevant places in this and other parts of the rules.

These rules do not include a section of current Rule 10 concerning the duties of counsel, which is adequately covered by Civil Rule 5.3.

**Rule 32 (“Appointment of a Statutory Representative (Formerly Known as Guardian Ad Litem)”) supersedes current Rule 15.1 entitled “appointment of guardian ad litem.”** The appointment of a guardian ad litem in a probate proceeding appears contrary to legislative changes that replaced the guardian ad litem with a “representative” under A.R.S. § 14-1408. Because the term “guardian ad litem” remains in the nomenclature, the definition of a statutory representative in proposed Rule 32 states that it “includes the role traditionally described as a guardian ad litem.”

Another provision of proposed Rule 32 precludes the court from appointing a statutory representative for the subject person of an adult guardianship or protective proceeding if the court has not made a finding, after a hearing, that the person is incapacitated or in need of protection, as those terms are defined in statute. The proposed rule includes a new comment that should help to distinguish “statutory representative” from “guardian ad litem.”

Part Five includes **Rule 33 (“Compensation for Fiduciaries, Attorneys, and Statutory Representatives”)**. The Task Force restyled Rule 33 by adding section and subpart headings, making the rule easier to navigate. Proposed Rule 33 also clarifies the two pathways for requesting court approval of fees: first, in section (c),

through an account that identifies fees; and second, in section (d), through a separate petition requesting fee approval. As detailed in section (b), a request under either pathway requires the same documentation. Section (b) also includes the warning, derived from A.C.J.A. § 3-303(D)(2)(c), that “[b]lock billing is not permitted.”

Part Five also includes ***Rule 34 (“Prudent Management of Costs”)***, which corresponds to current Rule 10.1 with one notable exception. The proposed rule alerts readers that other authorities also address prudent management by referencing A.R.S. § 14-1104 and A.C.J.A. § 3-303.

#### **Part Six: Rules That Apply Only to Guardianships, Conservatorships, and Decedents’ Estates (Rules 36 - 40)**

Part Six includes Rule 38, which requires training for non-licensed fiduciaries, and a rule concerning the duties of court-appointed fiduciaries that is currently Rule 10(C). Part Six also includes the following rules:

***Rule 36 (“Order Appointing Guardian, Conservator, Personal Representative, or Special Administrator”)*** changes the phrase “restricted accounts” to “restrictions on authority.” The rule accordingly requires that the court’s appointment order include restrictions on authority rather than restrictions on assets. A new comment provides examples of restrictions on authority.

***Rule 37 (“Order to Fiduciary”)*** contains the substance of current Rule 25, including references to Forms 1 through 4. However, the current rule recites that

those forms are in the Arizona Code of Judicial Administration. That is incorrect, and the proposed rule removes those recitals.

**Rule 39 (“Issuing and Recording Letters of Appointment”)** differs from current Rule 26 by including a new section explaining that a fiduciary requires court authority before acting for an estate or a subject person. The proposed rule defines “letters of appointment.” It also includes a new provision, similar to the existing rule requiring recording of a conservator’s letters of appointment, which requires a personal representative to record its letters of appointment.

#### **Part Seven: Rules That Apply Only to Guardianships and Conservatorships (Rules 41 - 49)**

Some of the current rules covering subjects now found in Part Seven lacked section titles, which the proposed rules have added. The concluding words of the title of Rule 41 (*“Appointment of an Attorney, Medical Professional, or Investigator in a Guardianship or Protective Proceeding”*) signal that these provisions do not apply to other probate proceedings, such as decedents’ estates or trusts. Proposed Rule 41 also permits the court to appoint an attorney, investigator, or medical professional other than the one nominated by the petitioner. The Task Force eliminated language from current Rule 19(E) that allows the court to continue a hearing if there is non-compliance with the rule’s provisions, because the court has this inherent authority.

***Rule 42 (“Training, Role, and Termination of an Attorney for a Subject Person”)*** includes a new section (b) concerning the role of an attorney who represents the subject of a guardianship or protective proceeding. This section says,

The attorney for the subject person must advocate for the subject person’s wishes to the extent the attorney is able to ascertain those wishes. The attorney must, as far as possible, maintain a normal client-lawyer relationship with the subject person. In addition, the attorney must act to protect the subject person’s substantive and procedural due process rights.

This new provision, which is based on ER 1.14, should provide guidance to counsel when the client is incapacitated and unable to communicate, or when the client directs counsel to take a position that counsel believes is contrary to the client’s best interests.

***Rule 44 (“Appointment of a Temporary Guardian or Temporary Conservator”)*** concerns the appointment of a temporary guardian or temporary conservator and replaces current Rule 23. The proposed rule eliminates the provision in current Rule 23 that requires the court to decide whether to make a temporary appointment and whether the appointment may occur without notice, because these requirements are already contained in statute.

***Rule 45 (“Conservator’s Inventory, Budget, and Account”)*** consolidates provisions of current Rules 30, 30.1, and 30.3, with several notable changes.



Rule 45(a), like A.C.J.A. § 3-302(D)(3), now allows the court to vary this rule's requirements, including requirements concerning forms, "if the court finds the variation is consistent with prudent management and oversight of the case."

The proposed rule eliminates a provision in current Rule 30 requiring an amended inventory because the later-discovered asset will be addressed in the first account. Under current Rule 30.3, a budget is required "unless ordered by the court." Under the proposed rule, a budget is required only "if the conservator believes it prudent or if the court orders." If a budget is timely filed, it is "presumed reasonable unless there is an objection." The proposed rule states that "unless otherwise ordered, a conservator should submit simplified accounts using Form 9," so many conservators will not be required to use the complex account forms that are currently mandated.

The sustainability provisions of current Rule 30.2 are now in proposed Rule 45(e)(3). The sustainability calculation is included on the required account form, so the formula has been omitted from the text of the rule. The phrase "the duration of time the protected person needs care or fiduciary services" in the current rule is vague and has been replaced with the less vague phrase, "for the protected person's foreseeable needs." Rather than the "management plan," which the current rule requires for a non-sustainable conservatorship, the proposed rule requires "a discussion of the available options."

**Rule 46 (“Annual Guardian Reports”)** relocates the separate requirement of current Rule 30(C) for annual guardian reports.

**Rule 47 (“Guardian’s Inpatient Psychiatric Treatment Authority”)** consolidates two current rules that addressed the same subject. Rule 47(a) (“initial request for inpatient psychiatric treatment authority”) originated from current Rule 24 (“appointment of guardian with inpatient mental health authority”). Rule 47(b) (“renewal of a guardian’s inpatient psychiatric treatment authority”) is derived from current Rule 36 (“renewal of guardian’s inpatient mental health authority”). Section (a) of the new rule allows the entry of an order without notice, if certain conditions are met, which codifies existing practices. Section (a) also requires a guardian who is given inpatient psychiatric treatment authority to sign a supplemental acknowledgement of duties associated with that authority, and the court to enter a corresponding order.

**Rule 48 (“Remedies for Non-Compliance by a Guardian or Conservator”)** adds the option of entering an order under Civil Rule 70 (“enforcing a judgment for a specific act”).

**Part Eight: Rules That Apply Only to Decedents’ Estates and Trusts (Rules 50 - 52)**

Part Eight brings together the rules that apply only to decedents’ estates and trusts. It re-orders them and adds clarifying titles. Proposed **Rule 50 (“Personal Representative’s Inventory and Account”)** contains the general content from

current Rule 31 (“decedents’ estates—specific procedures”), and proposed **Rule 52** (“**Trustee’s Account**”) addresses the content of current Rule 32 (“trusts—specific procedures”). **Rule 51** (“**Administrative Closure of a Decedent’s Estate and Termination of Appointment**”) derives from current Rule 15.2(A) and uses the more accurate term “administrative closure” in lieu of “involuntary termination.”

### **Part Nine: Recoveries for, and Distributions to, Minors and Protected Adults (Rules 53 - 54)**

The Task Force’s extensive discussion of **Rule 53** (“**Settlement of Claims of Minors and Adults in Need of Protection**”) included consideration of [\*Gomez v. Maricopa County\*](#), 175 Ariz. 469 (App.1993), and suggestions from the State Bar’s Civil Practice and Procedure Committee. The proposed rule clarifies the existing rule by explaining when court approval of a settlement is required for the settlement to be binding on a minor or an adult in need of protection, and who may approve the settlement. The proposed rule also expands the current rule by permitting the appointment of a statutory representative or master, and by clarifying the variety of permissible orders beyond simply establishing a conservatorship. For example, the new rule would allow court approval of a structured settlement or the establishment of a special needs trust, or an ABLE or 529 account.

### **Part Ten: Forms (Rule 55)**

Current Rule 38 refers to forms as “preferred” and “exclusive,” but proposed **Rule 55** (“**Forms**”) uses the terms “recommended” or “required,” which are more

understandable. Rule 55 does not contain references to the Arizona Code of Judicial Administration or to individual forms, but rather references the self-service page of the Arizona Judicial Branch website, where the forms are located. The rule permits the Court to adopt, approve, or modify probate forms by administrative order.

**Section 9: Conclusion.** After the comment period closes, the Task Force will meet to discuss the comments and to revise its proposed rules as appropriate. Subject to those revisions, the Task Force asks the Court to abrogate the current Probate Rules and, in their place, to adopt the proposed new Probate Rules shown in Appendix A.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January 2019.

By \_\_\_\_\_  
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Probate Rules Committee